STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE MEASURABLE COST SAVINGS DETERMINED BY DIRIGO HEALTH FOR THE SECOND ASSESSMENT YEAR	)))))	REPLY BRIEF OF THE MAINE AUTOMOBILE DEALERS ASSOCIATION INSURANCE TRUST
DOCKET NO. INS-06-900	)	

NOW COMES the Maine Automobile Dealers Association Insurance Trust (the "Trust"), by and through its undersigned counsel, and submits the following reply brief in response to the briefs filed by the Dirigo Health Agency Board of Directors (the "Board") and Consumers for Affordable Health Care ("CAHC").

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INTRODUCTION

Early on in these proceedings, the Trust urged the Board to act so as to enhance, not destroy, its credibility. Regretfully, but predictably, the Board declined the invitation. The proceedings were marked by the exercise of unfettered bias, an admitted lack of expertise, and procedural rulings that were uninformed by notions of fair play, and were capped by an inexcusable failure to disclose a blatant conflict of interest by a sitting Board member. Confronted with these realities and stuck with a Decision which under no impartial reading could be deemed reasonably supported in the record, the Board retreats to a "because I said so" argument based on a deferential standard of review that is contrary to that set forth in the controlling statute.

ARGUMENT

I. THE BOARD CONVENIENTLY FAILS TO ADDRESS TWO OF THE ARGUMENTS RAISED BY THE TRUST.

Two of the arguments raised by the Trust in its opening brief were that: (1) the Board had forfeited its ability to make an AMCS Determination given its failure to make such a determination before the April 1, 2006 deadline set forth in the Act; and (2) many of the purported cost savings approved by the Board were based on assumptions having absolutely no

factual basis.[1] (Trust Brief at 8-9, 20-22). Notwithstanding the fact that the first of these arguments calls into question the legality of the Board making an AMCS determination for the Second Assessment Year at all, and the fact that the second argument undercuts millions of dollars worth of the savings claimed by the Board in the name of AMCS, the Board has chosen not to respond to either. The explanation for the Board's failure to respond is clear—it has nothing with which to rebut the arguments.

II. THE BOARD'S DECISION IS ENTITLED TO NO DEFERENCE.

Rather than providing a detailed defense of its AMCS Determination, the Board's brief offers up only conclusions and generalities. The Board apparently believes that it can afford to rely exclusively on conclusions and generalities because, in its view, this is merely a *pro forma* proceeding at the conclusion of which the Superintendent will simply rubber stamp the Board's decision. The Board, however, is sadly mistaken.

A. The Deferential Standard Of Review Advocated By The Board Is Contrary To The Standard Set Forth In The Act.

According to the Board, the Superintendent must defer to the Board's interpretation of the Act, and must approve the Board's filing unless the Intervenors can show that it is "arbitrary and capricious." (Board Brief at 2-3). This argument is unpersuasive.

The standard of review to be applied by the Superintendent is clearly set forth in the Act itself; the Superintendent shall "approve the filing upon a determination that the aggregate measurable cost savings filed by the board are reasonably supported by evidence in the record." 24-A M.R.S.A. § 6913(1)(C). Nowhere does the Act state that the Superintendent is to defer to

[1] The other Intervenors similarly challenged the lack of factual support for many of the assumptions for the purported cost savings calculated by Mercer and adopted by the Board. (Chamber Brief at 41-48; Anthem Brief at 22-25; MEAHP Brief at 29-34).

the Board's interpretations, nor does the Act state that the Superintendent is to approve the Board's filing unless it is "arbitrary and capricious."

Moreover, reliance on a standard of review whereby a court is deferring to the special expertise of an agency, which it does not itself possess, is misplaced here. Not only is the Superintendent not a court, the Superintendent possesses expertise significantly greater than that of the Board.[2] The Act instructs the Superintendent to approve the Board's filing *only* if it is reasonably supported by the evidence in the record. Therefore, to fulfill the express statutory mandate, the Superintendent must undertake his own independent review of the record developed before the Board. The Act was set up this way for a very good reason–the Board is inherently self-interested, not a neutral arbiter. The Board needs the funding of AMCS to secure and fulfill its mission,[3] and the Board members have an inherent fiduciary duty to secure such funding, a duty clearly at odds with an objective analysis of the evidence. Accordingly, the Act requires an unbiased review by an unrelated agency with its own expertise to counter balance the Board's inherent self-interest.

B. The Board's Claimed Entitlement To Deference Strains Credulity.

Even assuming *arguendo* that the Board could make a plausible case in the abstract for the Superintendent to afford its AMCS Determination some modicum of deference, the circumstances of this case are such that any deference is completely unwarranted. The Law Court has noted that the process can be so procedurally tainted that an agency may lose any deference to which its decision may have been entitled. See Northeast Occupational Exchange, Inc. v. Bureau of Rehabilitation, 473 A.2d 406, 411 n.10 (Me. 1984). Such is the case here.

1. The Proceedings Before The Board Were Neither Fair Nor Impartial.

[2] Two members of the Board admitted their lack of expertise. See *infra*, Section II(B)(3).
[3] Or, more accurately, the Board's misguided view of its mission.

The Board devotes two pages of its brief to describing how it afforded the parties a "fair and impartial hearing," apparently conceding the notion that such was a good idea. (Board Brief at 4-5). That simply did not happen, however; the proceeding here was anything but fair and impartial. Like a riverboat gambler, the Board stacked the deck against the Intervenors from the beginning, and when the need arose, it shuffled the cards and restacked the deck. And like the gambler when caught, the Board (Decision) should be dropped off at the nearest sandbar, to make it to shore as best it can.

The Trust detailed many examples of the Board's procedural unfairness in its opening brief (Trust Brief at 4-7) and will not repeat them here. However, in addition to these procedural irregularities, the conduct of the Board during the evidentiary hearing and its deliberations, exhibits a lack of impartiality on the Board's part, *to wit*:

1. Orders to the Intervenors' counsel to truncate or rush through witness examinations. (Record at 4985, 4989, 4995, 4997, 5000, 5004, 5046, 5048, 5058, 5119, 5121, 5125, 5128, 5137, 5138, 5179).

2. Statements that examinations by Intervenors were not useful to the Board in making its decision. (Record at 4997) (Board member stating that testimony that Mercer Methodology counts as "uninsured" those enrolled in DirigoChoice is not helpful "to the board to make a determination"); (Record at 5013) (Board member not interested in hearing whether cost increases from a budget would be counted against Dirigo, if corresponding cost decreases are used to increase AMCS); (Record at 5103) (Board member attempting to limit examination of Mercer witness on Medicare Cost Reports, suggesting that testimony concerning hospital budget considerations has no value to the Board).

3. Examinations by Board members illustrating the Board's predilection to finding as much AMCS as possible. (Record at 5006) (Board member "examining" Mercer expert and characterizing report as "highly conservative," with no examination on the multiple assumptions Intervenors previously pointed out as having no documentary support); (Record at 5137) (Board member, when questioning Chamber witness, essentially arguing that the cost savings base is not reset for each year's AMCS determination). By contrast, the DHA and CAHC were permitted to offer supplemental direct, re-direct, and cross-examinations, unfettered by any negative comments or rulings from the Board. Indeed, the only "cross" performed by the Board of DHA or CAHC witnesses was friendly, rehabilitative, or both. (Record at 5006, 5043, 5050-51, 5097, 5111, 5191).

4. Precluding Intervenor examinations of Mercer witnesses on the very documents that Mercer produced, ruling that the witnesses could not be called upon to explain the internal documents reflecting the development of the methodologies at issue unless the witness was named on the document in question. (Record at 4998-99, 5128).

5. Hardly impartial conduct by the Hearing Officer in the form of changing the question asked by Intervenor counsel (Record at 5013, 5055, 5106), instructing witnesses as to how to go about answering questions posed (Record at 5010, 5046, 5056, 5102, 5103), and providing the opportunity for witness elaboration without a question pending. (Record at 5097, 5104).

6. During the Board's deliberations, two members of the Board repeated the Mercer mantra that its methodology was "conservative." (Record at 5212, 5213, 5220, 5221, 5248, 5249).

In short, the conduct of the Board during the hearing was but a continuation of the one-sidedness of its pre-hearing procedural orders.

2. The Entire Process Has Been Tainted By Mr. McCann's Undisclosed Membership On CAHC's Board Of Directors.

Under the Act, action by the Board requires the affirmative vote of three members. See 24-A M.R.S.A. § 6904(6). Here, the Board's AMCS Determination was made based on a 3-0 vote.

On June 19, 2006, counsel became aware of the fact that Ned McCann, one of the new members of the Board, is also a member of CAHC's Board of Directors—a fact that had never been disclosed during the proceedings before the Board. (Joint Letter Concerning Undisclosed Affiliations of Dirigo Board Member).[4] Thus, the Kafkaesque nature of the Board's proceeding has been compounded by the fact that the Board member who cast the deciding vote with respect to the Board's AMCS determination was the member of the board of one of the parties.

That Mr. McCann is a member of CAHC's board was confirmed by CAHC. (CAHC Reply to Joint Letter at 1-4). In fact, CAHC is remarkably unapologetic about its failure and the failure of Mr. McCann to disclose Mr. McCann's relationship with CAHC, and, instead attacks counsel for even raising the issue (even going so far off the deep end as to suggest that sanctions are in order). According to CAHC, the concerns that have been raised by the Intervenors regarding McCann's affiliation are much ado about nothing because: (1) counsel knew or should have known of Mr. McCann's affiliation based on a January 11, 2006 letter on CAHC letterhead; (2) Mr. McCann's affiliation was disclosed during the legislative confirmation process; and (3)

[4] A copy of the Joint Letter is attached hereto.

unlike Dana Connors, the Chamber's President, Mr. McCann is an unpaid volunteer. CAHC just doesn't get it.[5]

First, the suggestion that counsel knew or should have known of Mr. McCann's affiliation with CAHC on the basis of a January 11, 2006 letter is preposterous. Mr. McCann was not even nominated to the Dirigo Board until April 10, 2006—three months later. (CAHC Reply to Joint Letter Exhs. 2-5). Until his nomination to the Dirigo Board, none of the Intervenors had any reason to care about Mr. McCann or his affiliation with CAHC.

Second, the fact that Mr. McCann may have disclosed his affiliation with CAHC as part of the confirmation process is equally unpersuasive. The issue here is not whether Mr. McCann disclosed his affiliation with CAHC to the Governor and to the Legislature, but why he did not disclose that affiliation to the parties in this proceeding. Indeed, on his Legislative Questionnaire he provided during the confirmation process Mr. McCann stated that "If, in the unforeseen circumstance of a conflict or potential conflict, I would excuse myself from any decision making processes related to the potential conflict." (CAHC Reply to Joint Letter Exh. 6 at p. 4).

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[5] CAHC clearly has assumed the role of Lord Raglan and relegated the Intervenors to the role of dragoons:

Was there a man dismay'd?
Not tho' the soldier knew
Someone had blunder'd
Their's not to make reply,
Their's not to reason why,
Their's but to do and die:
Into the valley of Death
Rode the six hundred.

Unlike Tennyson, however, no one is likely to pen stanzas about CAHC's blunder or the fate of the Intervenors.

The Board to date has remained conspicuously silent.

What is truly remarkable is not so much that Mr. McCann did not disclose his affiliation with CAHC, but that neither he nor CAHC's counsel chose to disclose that affiliation when the recusals of Trish Reilly and Rebecca Wyke were the subject of a pre-hearing motion by the Trust (Record at 1178-1204), the recusals of Mr. Connors, Ms. Reilly, and Ms. Wyke were discussed prior to the start of the evidentiary hearing (Record at 4973), and the recusals of Ms. Reilly and Ms. Wyke were revisited during the Board's deliberations. (Record at 5235).

Finally, CAHC's attempt to distinguish Mr. McCann's situation from that of Mr. Connors on the ground that Mr. McCann is an "unpaid volunteer," while Mr. Connors is a "highly-compensated employee" is offensive. Whether a conflict of interest exists does not hinge on one's level of compensation. The fact remains that Mr. McCann is a member of the board of a party who has consistently advocated the highest possible AMCS figure—whether he is paid or not, Mr. McCann helps set the policy of one of the parties before him now.

3. The Members Of The Board Have No Expertise.

The oft-stated justification given by the Law Court for deferring to an agency's interpretation of a statute administered by it is that the agency possesses a degree of expertise the court lacks. See e.g., Botting v. Department of Behavioral & Development Servs., 2003 ME 152, ¶ 9, 838 A.2d 1168, 1171; Guilford Transp. Indus. v. Public Utils. Comm'n, 2000 ME 31,¶¶ 6-11, 746 A.2d 910, 912-13. Here, however, it is clear that the Board possesses no such expertise. By the time the Board made its Decision on May 12, 2006, two of the voting members of the Board, Messrs. Beal and McCann, had been members of the Board for approximately one week; the Board's Chairman, Dr. McAfee, found it necessary to provide a history lesson to Messrs. Beal and McCann at the beginning of the Board's deliberations; Messrs. Beal and McCann both indicated during the deliberations that they found it difficult as new members of

the Board to get up to speed; and Messrs. Beal and McCann simply deferred to Dr. McAfee during the deliberations. (Record at 5199, 5201-5205, 5209, 5250, 5260, 5265). To defer to the supposed "expertise" of the Board under these circumstances defies common sense.

III. THE BOARD'S DECISION IS BASED ON A MISREADING OF THE STATUTORY LANGUAGE.

In its opening brief, the Trust pointed out an important statutory distinction apparently lost on the Board–the distinction made in the Act between the Dirigo Health Agency and the Act itself. (Trust Brief at 9-11). Under the Act, only those cost savings attributable to the DHA's operations, *i.e.*, its functioning as a health insurance provider, may properly be included in AMCS. At no point, however, does the Board address this distinction. Rather, it argues that the phrase "as a result of the operation of Dirigo Health" modifies "bad debt and charity care," not "cost savings," so that AMCS may include any categories of cost savings that are "identified or flow from the Dirigo legislation or other government initiatives." The sole basis for this argument is the lack of a comma between "in this State" and "as a result of the operation of Dirigo Health." (Board Brief at 6-7). This argument is fundamentally flawed. The talismanic significance the Board assigns to the missing comma is entirely misplaced.

The language in question is as follows: "the Board shall file with the Superintendent of insurance its determination as to the aggregate measurable cost savings in this State, including any reduction or avoidance of bad debt and charity care cost to health providers as a result of the operation of Dirigo Health." 24-A M.R.S.A. § 6913(1)(A). According to the Board, the entirety of the second clause is simply an illustration of the types of "cost savings" the Board may include in its AMCS determination.

If, however, the Legislature meant to authorize, as the Board suggests, the inclusion of *any* category of "cost savings" in the AMCS determination, it would not have followed the

broad, indeed limitless, grant with a single remarkably specific illustration. A specific illustration sheds no light on the broad contours of the "cost savings" properly included in the AMCS determination. In fact, if Board's argument were accepted, the second clause could be deleted from Section 6913(1)(A) without changing its meaning one iota.

Since adoption of the Board's comma argument would render the phrase "as a result of the operation of Dirigo Health" superfluous, it contravenes the long-standing cannon of statutory construction that nothing in a statute may be treated as surplusage if a reasonable construction is otherwise possible. See City of Bangor v. Penobscot County, 2005 ME 35, ¶ 9, 868 A.2d 177, 180. Meaning can be given to every word in the statute only by including the missing comma. Indeed, only then does "reduction or avoidance of bad debt and charity care" become truly illustrative of the types of cost savings that can be included in the AMCS determination, because such savings are both cost savings and the result of the operation of Dirigo Health.

Finally, that the phrase "as a result of the operation of Dirigo Health" is intended to modify "cost savings" is demonstrated by the Act's structure. As an initial matter, the Board's duty to determine the existence of AMCS is contained in subchapter 1 of the Act–the same subchapter in which the DHA and the Board are established, the Board's powers and duties are laid out, guidelines for the Dirigo Health Plan are set forth, and the Board's authority to contract with an insurance carrier to administer the Dirigo Health Plan is conferred. The Legislature would not have included the AMCS provision in the portion of the Act establishing the DHA and setting forth the contours of the program it was created to administer if AMCS were not dependent in some fashion on the DHA's administration of that program. Indeed, one of the Board's duties is to annually report to the Governor and to various of the Legislature's Joint Standing Committees "on the *impact of Dirigo Health* on the small group and individual health

insurance markers in this state and any reduction in the number of uninsured individuals in the state." 24-A M.R.S.A. § 6908(6) (emphasis added).

In short, although punctuation can be considered in the interpretation of a statute, it is "subordinate to the text and is never allowed to control its plain meaning." State v. Young, 476 A.2d 186, 187 (Me. 1984) (quoting Taylor v. Inhabitants of the Town of Caribou, 102 Me. 401, 406, 67 A. 2, 4 (1907)); see also United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993) ("No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning."); see generally 2A Norman J. Singer, Sutherland Statutory Construction § 47:15 (6th ed.). Here, the meaning of the statute is clear that it is not simply cost savings in the marketplace generally that the Board is to quantify and capture, but rather only those cost savings *that the DHA had a hand in creating*.

IV. CAHC'S BRIEF SHOULD BE IGNORED.

CAHC's brief is devoted exclusively to attempting to repudiate the Board's use of the 4.7% median rate of growth advanced by John Sheils, which had the effect of reducing the CMAD savings from Mercer's claimed $72.7 million, to the $14.5 million approved by the Board.[6] Apparently anticipating a different outcome on its motion to present additional evidence, the cornerstone of CAHC's argument is a post-hearing report supposedly performed by Mercer. (CAHC Brief at 5-8). However, given the fact that the report on which it is based is not contained in the record developed before the Board and the fact that the Superintendent has denied the CAHC's motion to present this additional information, CAHC's brief contains nothing relevant and should, therefore, be ignored.

[6] For its part, the Board is sticking with the $14.5 million in CMAD savings. (Board Brief at 9-11).

CONCLUSION

For all of the foregoing reasons, and those set forth in the Brief of the Maine Automobile Dealers Association Insurance Trust dated June 23, 2006, the Superintendent should disapprove the Board's filing in its entirety.

Dated: July 7, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that by 3:00 p.m. on July 7, 2006, I served the above filing on the following parties and counsel of record as follows:

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